Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

No. 75-590

In the Supreme Court of the United States

OCTOBER TERM, 1975

CONSUMERS UNION OF UNITED STATES, INC.,
PETITIONER

v.

PERIODICAL CORRESPONDENTS' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provisions and congressional rules involved	2
Statement	5
Argument	13
Conclusion	15

CITATIONS

Cases:

Doe v. *McMillan*, 412 U.S. 306 13
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 13
Gravel v. *United States*, 408 U.S. 606 13

Constitution and congressional rules:

Constitution of the United States:

Article I, Section 5, Clause 2 ..... 2, 11, 14
Article I, Section 6, Clause 1 2
First Amendment 10, 11, 12, 13
Fifth Amendment 10, 11, 12

Rules Governing Periodical Press Galleries:

Rule 1 3-4
Rule 2 ..... 4-5, 7, 9, 11, 13
Rule 3 5
Rule 4 5
Rule 5 ..... 5, 8

Constitution and congressional rules—Continued — Page

Rule XXXIV, Rules and Manual of the United States Senate (1973) 2-3, 6
Rule XXXIV, Rules of the House of Representatives (1975) 3, 6

Miscellaneous:

Congressional Directory, 94th Cong., 1st Sess. (1975) 3

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-590

CONSUMERS UNION OF UNITED STATES, INC.,
PETITIONER

v.

PERIODICAL CORRESPONDENTS' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11a-21a) is reported at 515 F.2d 1341. The opinion of the district court (Pet. App. 1a-10a) is reported at 365 F. Supp. 18.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1975. The petition for a writ of certio-

rari was filed on October 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the decision by Congress, acting in accordance with its internal rules, to reject an unqualified applicant for admission to its press galleries is reviewable in a suit brought against congressional functionaries who recommended the decision.

CONSTITUTIONAL PROVISIONS AND CONGRESSIONAL RULES INVOLVED

Article I, Section 5, Clause 2 provides:

> Each House may determine the Rules of its Proceedings * * *.

Article I, Section 6, Clause 1 provides:

> [F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.

Rule XXXIV, Rules and Manual of the United States Senate (1973), provides:

> [The Senate Committee on Rules and Administration] shall make such regulations respecting the reporters' galleries of the Senate, together with the adjoining rooms and facilities, as will confine their occupancy and use to bona fide reporters for daily newspapers and periodicals, to bona fide reporters of news or press associations requiring telegraph service to their membership, and to bona fide reporters for daily news dissemination through radio, wire, wireless, and similar media of transmission. These regulations shall so provide for the use of such space and facilities as fairly to distribute their use to all such media of news dissemination.

Rule XXXIV, Rules of the House of Representatives (1975), provides:

> Such portion of the gallery over the Speaker's chair as may be necessary to accommodate representatives of the press wishing to report debates and proceedings shall be set aside for their use, and reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may from time to time prescribe; and the supervision of such gallery, including the designation of its employees, shall be vested in the standing committee of correspondents, subject to the direction and control of the Speaker; * * *.

Rules Governing Periodical Press Galleries provide:[1]

> 1. Persons desiring admission to the Periodical Press Galleries of Congress shall make application to the Speaker, as required by rule XXXIV of the House of Representatives, and to the Committee on Rules and Administration of the Senate, as required by rule VI for the regulation of the Senate wing of the Capitol; and shall state in writing the names of all newspapers or publications or news associations by which they are employed, and what other occu-

---

[1] These Rules are published in the Congressional Directory, 94th Cong., 1st Sess. 938-939 (1975).

pation or employment they may have, if any; and they shall further declare that they are not engaged in the prosecution of claims pending before Congress or the departments, and will not become so engaged while allowed admission to the galleries; that they are not employed in any legislative or executive department of the Government, or by any foreign government or any representatives thereof; and that they are not employed, directly or indirectly, by any stock exchange, board of trade, or other organization, or member thereof, or brokerage house or broker, engaged in the buying and selling of any security or commodity, or by any person or corporation having legislation before Congress, and will not become so engaged while retaining membership in the galleries. Holders of visitor's cards who may be allowed temporary admission to the galleries must conform to the restrictions of this rule.

2. The applications required by rule 1 shall be authenticated in a manner that shall be satisfactory to the executive committee of the Periodical Correspondents' Gallery who shall see that the occupation of the galleries is confined to bona fide and accredited resident correspondents, news-gatherers, or reporters of reputable standing who represent one or more periodicals which regularly publish a substantial volume of news material of either general or of an economic, industrial, technical or trade character, published for profit and supported chiefly by advertising or by subscription, and owned and operated independently of any industry, business, association, or institution; and it shall be the duty of the executive committee at their discretion to

report violation of the privileges of the galleries to the Speaker, or to the Senate Committee on Rules and Administration, and pending action thereon the offending correspondent may be suspended.

3. Persons engaged in other occupations whose chief attention is not given to the gathering or reporting of news for periodicals requiring such continuous service shall not be entitled to admission to the Periodical Press Galleries. The Periodical Correspondents' list in the CONGRESSIONAL DIRECTORY shall be a list only of persons whose chief attention is given to such service for news periodicals, as described in rule 2, except that admission shall not be denied if his other work is such as to make him eligible to the Press Galleries or Radio Correspondents' Galleries.

4. Members of the families of correspondents are not entitled to the privileges of the galleries.

5. The Periodical Press Galleries shall be under the control of an executive committee elected by members of the Periodical Correspondents' Association, subject to the approval and supervision of the Speaker of the House of Representatives and the Senate Committee on Rules and Administration.

STATEMENT

The facts of this case are not disputed. Petitioner "is a reputable non-profit membership organization established in 1936 to foster the interests of consumers and to provide them with information and counsel on consumer goods and services" (Pet. App. 12a).

The organization "occasionally responds to invitations from Congressional committees to present its views on consumer issues" and "occasionally presents its views on consumer issues to Federal administrative agencies" (Pet.App. 13a, n. 3). It "derives a substantial portion of its income from the sale of its * * * monthly magazine, *Consumer Reports*," which "includes reports of independent product evaluations conducted at its laboratory facilities, together with news items and news analyses of general interest to consumers" (*id.* at 12a).

Respondent Periodical Correspondents' Association is "an unincorporated membership association composed of all periodical correspondents accredited for membership in the Periodical Press Galleries of the Congress" (Pet. App. 12a). The periodical press galleries, and three other congressional press galleries,[2] are supervised by the Senate Committee on Rules and Administration and the Speaker of the House of Representatives, pursuant to authority delegated to them by Rule XXXIV of the Standing Rules of the Senate and Rule XXXIV of the Rules of the House of Representatives (*id.* at 13a-15a). Under the "Rules Governing Periodical Press Galleries" jointly promulgated by the Chairman of the Senate Rules Committee and the Speaker of the House, the Periodical Correspondents' Association, through an elected executive committee, administers the periodical press

[2] The other galleries are the Press Galleries, the Radio and Television Correspondents' Galleries, and the Press Photographers' Galleries.

galleries on a day-to-day basis subject to the approval of the Senate Rules Committee and the Speaker of the House (Pet.App. 13a-15a). Admission to the galleries entails certain privileges, such as "special seating in the galleries, a variety of other facilities including telephones and typewriters in a room adjacent to the press galleries, entrance to the Senate Presidents' Room and House Speakers' Lobby, admission to the on-the-record daily press conferences held by the Senate leadership and the Speaker of the House, and facilitation of access to press conferences at the White House and administrative agencies" (*id.* at 15a).

In November 1972, the Washington, D.C., editor of *Consumer Reports* applied to the Senate Rules Committee and the Speaker of the House of Representatives for the admission of the magazine's correspondents to the periodical press galleries (Pet. App. 15a). The application was accompanied by a certification that it "conforms to the rules of the Periodical Press Galleries as approved by the Speaker of the House of Representatives and the Senate Committee on Rules" (App. 11).[3] It was tendered to the executive committee of the Periodical Correspondents' Association, in accordance with Rule 2 of the "Rules Governing Periodical Press Galleries." On January 9, 1973, the executive committee informed the editor that *Consumer Reports*' application could not be accepted because it was "[n]ot an independent publication," as required by Rule 2 (Pet. App. 15a). In a

[3] "App." refers to the joint appendix filed in the court of appeals.

letter to petitioner, dated January 29, 1973, the chairman of the executive committee explained that the committee's action was dictated by the controlling provisions of the rules promulgated by the Senate Committee on Rules and Administration and the Speaker of the House of Representatives, which bar any publication, such as *Consumer Reports*, which is not "owned and operated independently of any industry, business, association or institution" (App. 14; Pet. App. 13a, n.4).

On May 18, 1973, petitioner wrote to the Chairman of the Senate Committee on Rules and Administration (Senator Howard W. Cannon) and the Speaker of the House of Representatives (Representative Carl Albert) and requested that they "exercise [their] authority under Rule 5 of the Rules Governing Periodical Press Galleries" and grant *Consumer Reports'* application (App. 16-22; Pet. App. 15a, n. 9). The Chairman of the Senate Rules Committee, by letter dated May 23, 1973, informed petitioner that he would solicit the comments and recommendations of the chairman of the executive committee of the Periodical Correspondents' Association and the Sergeant-at-Arms of the Senate and that as soon as those comments and recommendations were received the matter would be considered by the Senate Rules Committee (App. 23).

On June 6, 1973, the chairman of the executive committee advised Senator Cannon that since " 'Consumer Reports' is published by Consumers Union, a non-profit organization which is a self-proclaimed advocate of consumer interests and, among other activities, testifies before Congressional committees in behalf of the interests of consumers, as Consumers Union judges those interests," the executive committee believed it was barred from the periodical press galleries by Rule 2 of the "Rules Governing Periodical Press Galleries," under which "only newsmen with no connections to any lobbying or advocacy group can properly be admitted to the galleries, for the protection of both members of Congress and disinterested organizations which publish periodicals" (App. 26-27; Pet. App. 12a, n. 2). On June 8, 1973, the Sergeant-at-Arms of the Senate informed the Chairman of the Senate Rules Committee that he concurred in the comments of the chairman of the executive committee of the Periodical Correspondents' Association (App. 25).

On June 13, 1973, at the regular meeting of the Senate Rules Committee, the matter of *Consumer Reports'* application was placed on the agenda and discussed (App. 24). At the conclusion of the discussion, the Senate Rules Committee decided that the application should be denied. On June 14, 1973, the Chairman of the Senate Rules Committee advised petitioner in writing of the Committee's decision (*ibid.*).[4]

Petitioner commenced this action for declaratory relief in the district court on July 3, 1973 (Pet. 8).

---

[4] The Speaker of the House of Representatives did not respond separately to petitioner's letter of May 18, 1973 (Pet. App. 15a, n. 9; 21a).

Petitioner asserted in its complaint that the "Rules Governing Periodical Press Galleries" were unconstitutional as a prior restraint on petitioner's First Amendment rights (Pet. 8-9). Petitioner also asserted that respondents had acted arbitrarily and capriciously, in violation of petitioner's rights under the Fifth Amendment, in denying *Consumer Reports'* application for admission to the periodical press galleries (*id.* at 9).

On October 11, 1973, the district court entered judgment in favor of petitioner (App. 119) and filed a memorandum opinion (Pet. App. 1a-10a). The district court recognized that it could not reach the merits of petitioner's action if that action were barred by the Speech and Debate Clause (*id.* at 7a). It also recognized that the Clause protects congressmen and their agents from having to defend in court actions undertaken as " 'an integral part of the deliberative and communicative processes by which Members participate in [congressional] proceedings with respect to consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." The court found, moreover, that respondents were "undoubtedly congressional agents acting at the specific behest of Congress and pursuant to its rules" (*id.* at 7a).

Nevertheless, the district court held that because respondents had failed to show that "congressional proceedings will be impeded or disrupted" by the admission of *Consumer Reports* to the periodical press galleries, the Speech and Debate Clause did

not apply (Pet. App. 7a). The court then proceeded to declare, on the merits, that the portion of Rule 2 of the "Rules Governing Periodical Press Galleries" that bars periodicals not "owned and operated independently of any industry, business, association, or institution" violated the free press guarantee of the First Amendment, and that the rejection of *Consumer Reports'* application violated petitioner's rights under the First and Fifth Amendments (App. 119; Pet. App. 8a-10a).

The court of appeals reversed and remanded. The court observed that, under the "broad grant of authority" provided by Article I, Section 5, Clause 2 of the Constitution,[5] Congress has long determined which members of the press are eligible for admission to its floors and galleries (Pet. App. 13a, 17a). The court noted further that "[f]or many years the Congress itself had directly controlled the seating of the press within its halls," but that "[t]he increasing complexities of legislative processes rendered it entirely proper for the delegation of the day to day control of the galleries to 'aids and assistants' " (*id.* at 20a). Since respondents "were acting by virtue of an express delegation of authority as aides or assistants of Congress," and since it was "conceded that they were acting in good faith," the court concluded that if the denial of *Consumer Reports'* application for admission to the periodical press galleries would have been

---

[5] Article I, Section 5, Clause 2 provides that "[e]ach House may determine the Rules of its Proceedings * * *."

immune from judicial inquiry under the Speech and Debate Clause if performed by Members of Congress, respondents were entitled to the same immunity (Pet. App. 20a).

The court then went on to examine respondents' actions and found that they were legislative in nature (Pet. App. 20a):

> [Respondents] were enforcing internal rules of Congress validly enacted under authority specifically granted to the Congress and within the scope of authority appropriately delegated by [them]. They were engaging in a sense in acts generally done in relation to the business before Congress, * * * "an integral part of the deliberative and communicative processes" * * *. They fell within "the sphere of legislative activity" * * *. * * * The Association's interpretation of the rules were approved expressly by the Senate Committee and at least acquiesced in on the House side. The Association was performing delegated legislative functions; in fact these were an integral part of the legislative machinery.

The court of appeals therefore held that the Speech and Debate Clause made this action nonjusticiable. Because of the basis of its holding, the court found it unnecessary to balance legislative considerations against petitioners' First and Fifth Amendments claims, beyond noting that petitioner had not been placed "in any less advantageous position than the public or the press generally; limitations were based upon distinctions applied to it as well as to others in similar situations" (Pet. App. 16a-17a). It also

found "neither justification nor authority * * * to enforce judicial views as to how [Rule 2] could be better drafted to accomplish its purposes" (Pet. App. 20a-21a).

ARGUMENT

The decision of the court of appeals is correct and represents simply the application of constitutional principles recently reaffirmed by this Court to the particular facts of this case. Thus, further review is unwarranted.

In *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, this Court comprehensively reviewed the purpose and scope of the Speech and Debate Clause and reaffirmed the constitutional principles that control this case. First, the Court admonished that the Speech and Debate Clause must be read "broadly to effectuate its purposes." *Id.* at 501. Next, the Court reaffirmed its prior holdings in *Doe* v. *McMillan*, 412 U.S. 306, and *Gravel* v. *United States*, 408 U.S. 606, that the Clause protects congressional aides, assistants, and functionaries (such as the Public Printer and the Superintendent of Documents) to the extent that they perform acts within the legitimate legislative sphere. 421 U.S. at 507. The Court also explicitly rejected the theory "that once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights." *Id.* at 509. Consequently, First Amendment balancing, which is often undertaken by courts when free speech or free press claims collide with legitimate legislative considerations, "plays no

part" in situations governed by the Speech and Debate Clause. 421 U.S. at 510, n. 16. Finally, the Court ruled that "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it." *Id.* at 508. "The wisdom of congressional approach or methodology is not open to judicial veto." *Id.* at 509.

The court of appeals correctly applied these principles to the particular facts of this case. As the court noted, Congress has exercised since 1789 the broad power conferred by Article I, Section 5, Clause 2 to restrict the access of members of the press to its floors and galleries. Because of the heavy burden of legislative business, Congress has delegated the daily administration of the periodical press galleries to the Periodical Correspondents' Association, subject to the supervision of the Senate Committe on Rules and Administration and the Speaker of the House of Representatives. The Association acts as the agent of Congress in this administrative capacity, and its interpretation of the "Rules Governing Periodical Press Galleries" in this case was an act within the legitimate legislative sphere which would have been protected by the Speech and Debate Clause if undertaken by Members of Congress. Indeed, the Senate Rules Committee specifically treated *Consumer Reports*' application for admission to the periodical press galleries as a legislative matter by taking it up at a formal session of the Committee and endorsing the Association's recommendation. Accordingly, the actions of the Association are immune under the Speech and Debate Clause.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ a certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys.

DECEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 599541 176